

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34154

DANA L. ROSE,	)	2008 Unpublished Opinion No. 496
	)	
Petitioner-Appellant,	)	Filed: June 4, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
RANDY BLADES,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

---

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Order of the district court on appeal from the magistrate division affirming dismissal of petition for writ of *habeas corpus*, affirmed.

Dana L. Rose, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; William M. Loomis, Deputy Attorney General, Boise, for respondent.

---

GUTIERREZ, Chief Judge

Dana L. Rose appeals from the district court's affirmance of the magistrate court's dismissal of his petition for writ of *habeas corpus*. We affirm.

I.

FACTS AND PROCEDURE

In 1999, Rose was convicted of aggravated assault. On July 27, 2006, he filed a petition for writ of *habeas corpus* alleging that a number of errors were committed at his trial and naming as the defendant, Randy Blades, the warden of the institution where Rose was being held. In regard to Blades, the only cognizable claim advanced by Rose was that a paralegal at the prison had failed to mail a petition for writ of *certiorari* to the United States Supreme Court. Rose subsequently filed a motion to disqualify the district judge. Blades responded, arguing that Rose's petition should be dismissed because he failed to establish administrative exhaustion, had named the wrong party, the petition contained claims that were a collateral attack on the

judgment and thus should have been contained in a petition for post-conviction relief, and finally, that he had, in fact, been allowed to file his writ of *certiorari*. Attached to Blades's response was a letter from the United States Supreme Court indicating that a petition for writ of *certiorari* had been received and docketed and an affidavit from the Idaho Department of Corrections paralegal, Jeff Kirkman, averring that he had sent Rose's petition for *certiorari* to the U.S. Supreme Court. Rose filed a reply, and the court granted his motion to disqualify the district judge. Then, on November 14, 2006, the magistrate dismissed Rose's *habeas corpus* petition. On intermediate appeal, the district court affirmed the magistrate. Rose now appeals.

## II.

### ANALYSIS

When addressing an appeal from the district court sitting as an intermediate appellate court, our role is to review the decision of the district court. *Losser v. Bradstreet*, Docket No. 33932 (March 28, 2008).

In general, we interpret Rose's argument on appeal to be that the district court erred in affirming the magistrate's denial of his *habeas corpus* petition. The decision to issue a writ of *habeas corpus* is a matter within the discretion of the trial court. *Johnson v. State*, 85 Idaho 123, 127, 376 P.2d 704, 706 (1962); *Brennan v. State*, 122 Idaho 911, 914, 841 P.2d 441, 444 (Ct. App. 1992). When we review an exercise of discretion in a *habeas corpus* proceeding, we conduct a three-tiered inquiry to determine whether the lower court rightly perceived the issue as one of discretion, acted within the boundaries of such discretion, and reached its decision by an exercise of reason. *Brennan*, 122 Idaho at 914, 841 P.2d at 444; *Sivak v. Ada County*, 115 Idaho 762, 763, 769 P.2d 1134, 1135 (Ct. App. 1989). If a petitioner is not entitled to relief on an application for a writ of *habeas corpus*, the decision by the petitioned court to dismiss the application without an evidentiary hearing will be upheld. *Brennan*, 122 Idaho at 917, 841 P.2d at 447.

In this case, the magistrate considered multiple affidavits when it granted Blades's "Motion to Dismiss and/or for Summary Judgment." When a court considers matters outside the pleadings, such motion must be treated as a motion for summary judgment. *Duvalt v. Sonnen*, 137 Idaho 548, 552, 50 P.3d 1043, 1047 (Ct. App. 2002); *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). Summary judgment under Idaho Rule of Civil Procedure 56(c) is proper only when there is no genuine issue of material fact and the moving

party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Duvalt*, 137 Idaho at 552, 50 P.3d at 1047; *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Duvalt*, 137 Idaho at 552, 50 P.3d at 1047; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

Idaho Code Section 19-4203(2) of Idaho's Habeas Corpus and Litigation Procedures Act makes it clear that the writ of *habeas corpus* is reserved to address a specific set of claims--those filed by inmates to "request that a court inquire into state or federal constitutional questions concerning:

- (a) The conditions of his confinement;
- (b) Revocation of parole;
- (c) Miscalculation of his sentence;
- (d) Loss of good time credits;
- (e) A detainer lodged against him."

In his petition for *habeas corpus*, Rose alleges he was subject to unlawful imprisonment (presumably arising from his arrest for the underlying charges), was entitled to use self-defense in the underlying incident, that the state and his counsel had concealed witnesses at trial, that his counsel had been ineffective on several grounds, that the court reporter had willfully omitted certain jury instructions thus interfering with Rose's appeal, and that prison paralegal had obstructed Rose from being able to send his writ of *certiorari* to the U.S. Supreme Court. Thus, as Blades points out in his brief to this court, the petition was comprised mostly of allegations of errors that occurred at Rose's criminal trial which are not issues appropriate for *habeas corpus* as defined in I.C. § 19-4203(2). On appeal, Rose continues to reference alleged errors in the underlying trial, including arguing that the jury instructions were erroneous, that there was misconduct on the part of his state appellate public defender, and alleging that the judgment should be void. He also attaches various documents including those alleging error in the criminal trial and in the appellate process, annotated excerpts from what appears to be the trial transcript, copies of the Idaho Code and federal code sections, lists of cases and case excerpts, his sworn affidavit concerning his account of the treatment of his petition for writ of *certiorari* to

the U.S. Supreme Court, a letter from the U.S. Supreme Court acknowledging that a petition for writ of *certiorari* was filed and docketed, a copy of a Department of Corrections Inmate Personal Funds Withdrawal Slip, several ISCI offender concern forms filled out by Rose, a memo from the Deputy Warden at ISCI addressing Rose's concerns, several affidavits of Jeff Kirkman regarding his treatment of Rose's petition for writ of *certiorari* to the U.S. Supreme Court, a letter from his trial counsel, an affidavit of the Deputy State Appellate Public Defender assigned to Rose's case, copies of several jury instructions presumably given at trial, a copy of the State's Supplemental Discovery Response from trial, and a letter from the Idaho Supreme Court indicating that his exhibits had been received.

A review of this record convinces us that aside from the issue of whether prison personnel interfered in Rose's desire to file a petition for writ of *certiorari*, which we discuss below, Rose raised no issues before the magistrate which could properly be addressed in a petition for *habeas corpus*. Thus, the district court did not err in affirming the magistrate's summary dismissal of Rose's petition in this regard.<sup>1</sup>

The only cognizable claim against Blades--and one that could be construed as a complaint concerning his "conditions of confinement"--was that the prison paralegal failed to mail his petition for *certiorari* to the U.S. Supreme Court. However, in response to this claim, Blades submitted the affidavit of Jeff Kirkman, a paralegal employed by the Idaho Department of Correction at ISCI, who averred that he did, in fact, mail the "entire stack of documents" given to him by Rose to mail to the United States Supreme Court. In addition, attached to the affidavit of William Loomis, the deputy attorney general assigned to the Idaho Department of Correction, was what he averred was a true and correct copy of a letter received from the United States Supreme Court stating that a petition for writ of *certiorari* in Rose's case had been filed and placed on the docket. Given this evidence, we cannot say that the district court erred in affirming the magistrate's grant of the state's motion for summary judgment on the issue of whether Kirkman had interfered with Rose's attempt to file the petition for writ of *certiorari*.

---

<sup>1</sup> Rose's appellate briefs also include various arguments and allegations which we do not address because either they were not raised below, *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991), or he fails to present any argument or authority in support of such issues. *Powell v. Sellers*, 130 Idaho 122, 129, 937 P.2d 434, 441 (Ct. App. 1997).

Accordingly, the order of the district court affirming the magistrate's dismissal of Rose's petition for writ of *habeas corpus* is affirmed.

Judge LANSING and Judge PERRY **CONCUR**.